

Tools for Managing Potential Liabilities Associated with Contaminated Port Land

David Ashton

Assistant General Counsel

Port of Portland

02/13/07

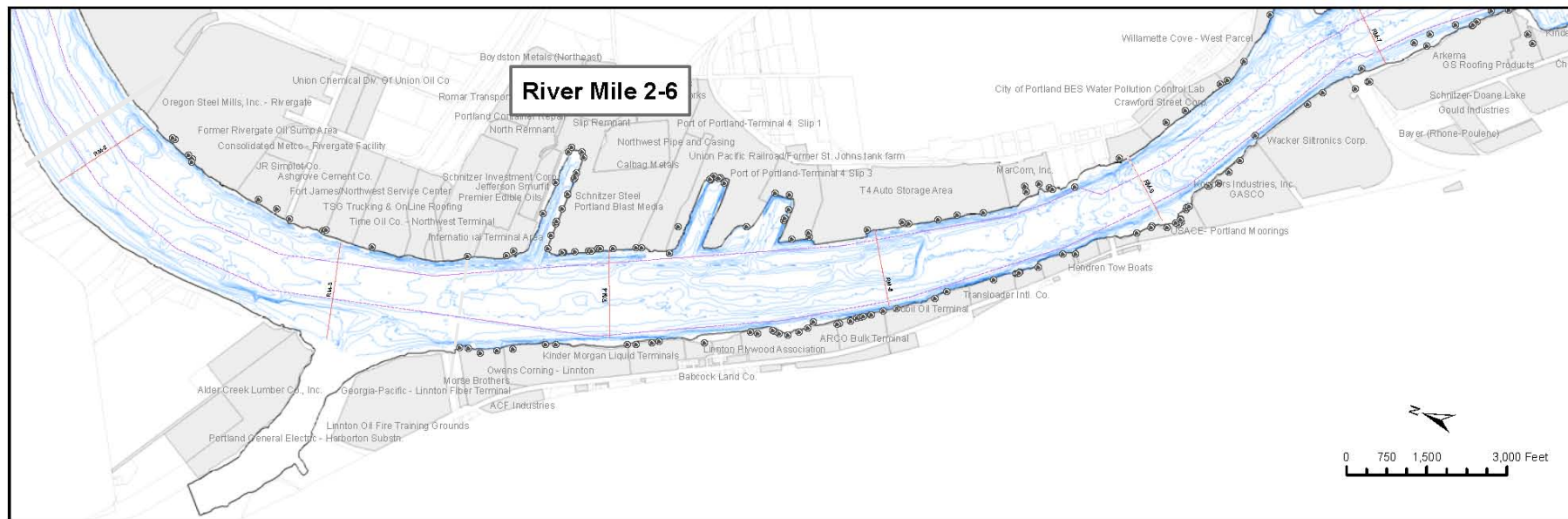
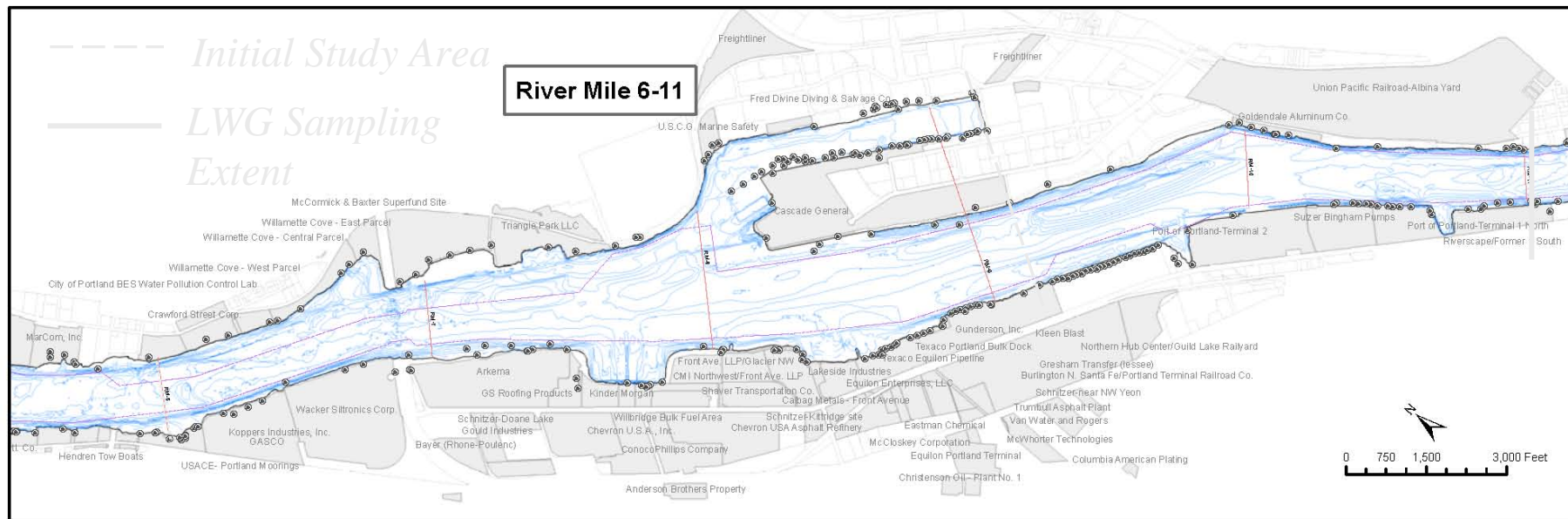
Managing Potential Liabilities

- ◆ Some Environmental Issues in Leasing
- ◆ Current Techniques for Contamination Liability Management
- ◆ Continuing Obligations Associated with Liability Management Defenses

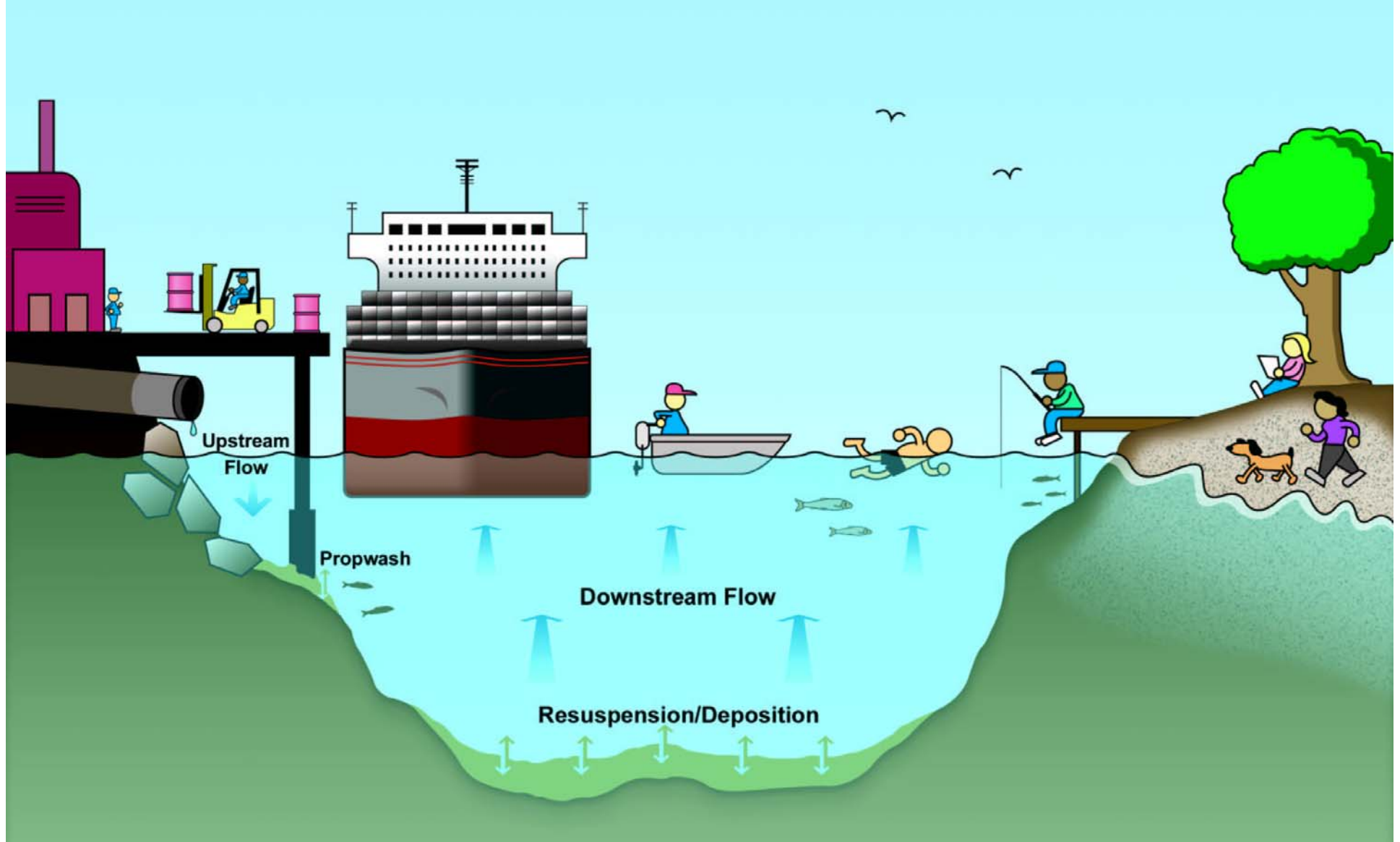
Managing Contamination Liabilities

- ◆ Port of Portland's Challenges:
 - All of our marine facilities are built on land filled with dredged materials
 - 3 marine terminals operate within the 9-mile Portland Harbor Superfund Site
 - Expansion is constrained by historically contaminated industrial lands surrounding Port
 - As a port district w/o sovereign immunity we are exposed to contamination liability under both federal and state law
 - In Oregon there are no available state-tax-funded cleanup programs

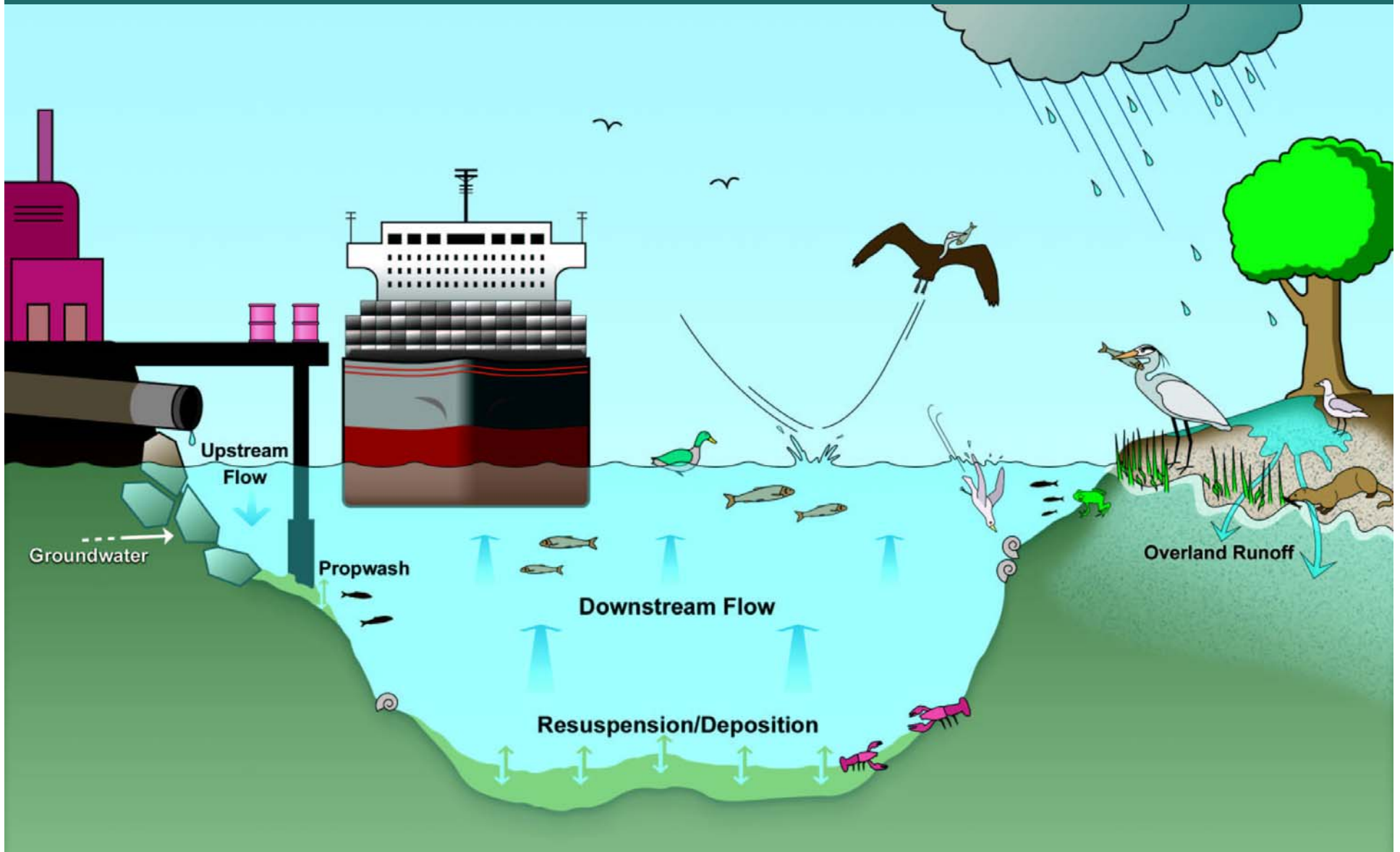
PHSS RI/FIS Study Area



Human Health Conceptual Site Model



Eco Risk Conceptual Site Model



Managing Contamination Liabilities

- ◆ Environmental Liability Allocation in Leasing:
 - Insist on “As Is +”
 - Environmental Baselineing
 - Liability Presumptions
 - Other protections:
 - ◆ SPAR Plans
 - ◆ Explicitly address NRD liability
 - ◆ Periodic audits & annual certifications of compliance
 - ◆ Compliance with voluntary BMPs

Managing Environmental Liabilities

- ◆ “As Is +”:

- Prospects required to do their own EDD
- Prospects required to perform AAI to meet CERCLA, OPA & equivalent state criteria:

- ◆ Port makes list of environmental documents & related resources available
- ◆ Port retains r & c rights re finalization of AAI
- ◆ Port retains right to supplement AAI

Managing Environmental Liabilities

- ◆ Insist on Environmental Baselineing:
 - Last 10 years, most Port industrial property has undergone environmental audit
 - 3 PHSS marine terminals have undergone RIs or RI/FSs
 - Phase 2 work aggressively undertaken as part of tenant exits
 - Results in pretty good information for baselining

Managing Environmental Liabilities

◆ Presumed Liable:

- Environmental conditions in baseline are allocated to appropriate person
- Any future condition not identified and discussed in environmental audit is presumed tenant's responsibility to resolve
- unless rebut presumption by demonstrating historical problem
- Problem of allocating onsite migrating contamination (the Contiguous Property situation discussed later)

Managing Environmental Liabilities

- ◆ UST, AST and Mobiles SPAR Plans:
 - Tenant commits to tank management and operation practices beyond SPCC requirements
- ◆ Explicit coverage of HSR resulting in NRD, tenant will resolve the NRD to satisfaction of NRTs
 - No issue of owner having NRD responsibilities

Managing Environmental Liabilities

- ◆ Periodic Audits & Annual certification of environmental compliance
 - Cert. supplements period, special and exit audit of compliance
- ◆ Contractual commitment to implement identified voluntary BMPs
 - Non-permit, negotiated or trade association BMPs

Port Green Leases

- ◆ Project arising out of an EPA Regional Leadership Forum
 - Document Port “Green leasing” strategies
 - Using Port contracts to leverage significant environmental improvement across media
 - Document and share BMPs
 - Kathleen Bailey 1/25/07 Memo
 - Bailey.Kathleen@epamail.epa.gov
 - POP’s “model” environmental language

Contaminated Site User Continuing Obligations

- ◆ Due diligence & precautions don't end with AAI for:
 - Innocent purchasers who find contamination
 - Condemnors who have to deal with contamination
 - CERCLA BFPPs (42 USC 9707(r)) and innocent acquirers under state prospective purchaser agreements (e.g., ORS 465.327)
 - Contiguous property owners/operators (passive migration scenario)

Contaminated Site User Continuing Obligations

- ◆ Innocent purchasers who find contamination
 - Found no contamination after AAI
 - No disqualifying contractual relationship with PRP
 - Subsequently discovers contamination that predated acquisition
 - Have continuing obligations re the contamination

Contaminated Site User Continuing Obligations

- ◆ Condemnors who have to deal with contamination
 - Acquisition through exercise of eminent domain authority by purchase or condemnation
 - Statutorily deemed to have no disqualifying contractual relationship with third party PRP
 - Have continuing obligations re the contamination

Contaminated Site User Continuing Obligations

◆ CERCLA BFPPs

- Contamination predates acquisition
- Non-affiliation
- AAI
- Have continuing obligations re the contamination

Contaminated Site User Continuing Obligations

- ◆ Contiguous property owners/operators
 - Property is or may be contaminated by hazardous substance release or threatened release from non-owned/operated property
 - Did not cause, contribute to or consent to contamination
 - Non-affiliation
 - Conducted AAI at acquisition and did not know of contamination
 - Have continuing obligations re the contamination

Contaminated Site User Continuing Obligations

- ◆ Common Elements of Continuing Obligations (CERCLA 2002):
- ◆ Threshold Criteria:
 - non affiliation w/ PRP & do AAI
- ◆ 5 Continuing Obligations:
 - Comply with land use restrictions and institutional controls
 - Take reasonable steps re onsite contamination
 - Cooperate, assist and give access (for cleanup & restoration)
 - Comply with information requests & subpoenas
 - Report reportable releases

EPA 2003 Memo Common Elements

<i>Summary: Common Element Among The Brownfields Amendments Landowner Provisions</i>	Bona Fide Prospective Purchaser	Contiguous Property Owner	Section 101 (35)(A)(i) Innocent Landowner
All Appropriate Inquiry	● ●	● ●	● ●
No Affiliation Demonstration	● ●	● ●	● ●
Compliance With Land Use Restrictions And Institutional Controls	● ●	● ●	● ●
Taking Reasonable Steps	● ●	● ●	● ●
Cooperation, Assistance, Access	● ●	● ●	● ●
Compliance With Information Requests And Administrative Subpoenas	● ●	● ●	● ● ●
Providing Legally Required Notices	● ●	● ●	● ● ● ● ● ●

Contaminated Site User Continuing Obligations

- ◆ Non-liable Innocent landowners & Condemnors
 - Unlike for BFPPs and Contiguous Owners, non-liability NOT conditioned on compliance with information requests or release reporting

Contaminated Site User Continuing Obligations

- ◆ Nonetheless, if worried someone might come after you, all four categories of non-liable parties:
 - Should have some form of Continuing Obligations planning (COP) & implementation
 - And document compliance

Contaminated Site User Continuing Obligations

- ◆ Port deals with COP requirements under EMS
 - Procedure requiring a COP for known contamination sites
 - Work instruction on elements of COP
 - Individual COPs
 - ◆ Document what's there, how its to be dealt with, & roles & responsibilities
 - ◆ emphasize duty to take care & report internally immediately on issues & discoveries
 - PAD your protections – plan, act, document
 - Educate and train
 - Add to checking & corrective action EMS functions

Continuing Obligations

- ◆ ASTM is working up a standard
- ◆ Working draft Standard Practice for Contaminated Properties (WK 9354)
- ◆ <http://backroom.terradox.com/share/ASTM/>
- ◆ Last conferenced February 1

Portfields

- ◆ NOAA-led federal interagency effort focusing on redevelopment of brownfields in port and harbor areas
- ◆ emphasizing development of environmentally sound port facilities
- ◆ <http://brownfields.noaa.gov/htmls/portfields/portfields.html>
- ◆ Overcoming contamination impediments

Portfields

- ◆ Worked with 3 pilots Tampa, New Bedford, Bellingham
- ◆ Southern Louisiana Ports
- ◆ Need for sharing challenges, opportunities & creative solutions across nation
- ◆ Need AAPA Portfields Initiative

Tools

- ◆ David Ashton
 - 503-944-7090
 - David.Ashton@PortofPortland.com